

Rahul (Migration) [2020] AATA 2759 (2 June 2020)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Rahul
CASE NUMBER:	1912739
HOME AFFAIRS REFERENCE(S):	BCC2015/1710105 BCC2019/2934363
MEMBER:	Adrienne Millbank
DATE:	2 June 2020
PLACE OF DECISION:	Brisbane
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Migrant) (Class BC) visa.

Statement made on 2 June 2020 at 10:45am

CATCHWORDS

MIGRATION – Partner (Migrant) (Class BC) visa – no spousal relationship – applicant’s divorce from sponsor – no mutual support – no shared commitments – no longterm commitment – decision under review affirmed

LEGISLATION

*Migration Act 1958, ss 5CB(2), 5F(2)(a), 65
Migration Regulations 1994, cl 100.221(2), rr 1.15A, 1.09A*

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 9 May 2019 to refuse to grant the visa applicant a Partner (Migrant) (Class BC) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant was born in India in 1985 and is 34 years old at the time of decision. He first arrived in Australia in 2009 on a Student (Subclass 572) visa. He departed Australia on 24 December 2014. On 20 February 2017 he was granted a Partner (Subclass 309) visa and returned to Australia on 16 March 2017. He has departed once since this time, from 9 January 2019 to 7 February 2019.
3. The applicant advised at hearing that he obtained a divorce from his first wife, in India, in 2014. He married the sponsor, an Australian citizen who was born in Spain, on 4 October 2014, in Brisbane. The applicant and the sponsor separated in May 2019. Their divorce was finalised on 23 February 2020.
4. The applicant applied for the visa on 10 June 2015 on the basis of his relationship with his sponsor. At that time, Class BC contained one subclass: Subclass 100 (Partner).
5. The criteria for the grant of a Subclass 100 visa are set out in Part 100 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
6. The delegate in this case refused to grant the visa on the basis that the applicant did not satisfy cl.100.221(2) which requires that the applicant continues to be the spouse or de facto partner of the sponsoring partner. The Department had received information from a reliable source that the relationship between the applicant and his sponsor had ceased.
7. A copy of the delegate's decision was provided to the Tribunal by the applicant.
8. The applicant appeared before the Tribunal on 19 May 2020 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Hindi and English languages.
9. The applicant was represented in relation to the review by his registered migration agent, who attended the hearing.
10. The hearing was held during the COVID-19 pandemic, and the Tribunal exercised its discretion to hold it by telephone. The Tribunal determined it was reasonable to hold the hearing by telephone, having regard to the nature of this matter and the individual circumstances of the applicant. The Tribunal also had regard to the Tribunal's objective of providing a mechanism of review that is fair, just, economical and quick, and the delay to the matter if the hearing was not to be conducted by telephone. The applicant did not raise any concerns in relation to holding a telephone hearing, and the Tribunal is satisfied that he was given a fair opportunity to give evidence and present arguments.
11. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

12. The issue before the Tribunal is whether the applicant meets the criteria for a Partner (Subclass 100) visa, that is, whether he continues to be the spouse or de facto partner of his Australian citizen, Australian permanent resident or eligible New Zealand citizen sponsor as defined in r.1.15A or r.1.09A.
13. **Whether the parties are in a spouse or de facto relationship**
14. Clause 100.221 requires that the applicant meet one of five alternative requirements. These include cl.100.221(2) and (2A) which require, among other things, that at the time of this decision, the applicant is the spouse or de facto partner of the 'sponsoring partner'. Unless the applicant was granted a Subclass 309 visa by Ministerial intervention, the 'sponsoring partner' is the person who was specified as the applicant's spouse or de facto partner or intended spouse or de facto partner in the related Subclass 309 application, being an Australian citizen, Australian permanent resident or eligible New Zealand citizen.
15. In the present case the applicant claimed that at the time of application he was the spouse of the sponsor, a 'sponsoring partner' within the meaning of that term. At the hearing, the applicant confirmed that he and the sponsor are divorced, that the relationship has ended, and he no longer has a sponsor. A copy of a Divorce Order from the Federal Circuit Court of Australia was provided by the applicant, showing that the parties' divorce was finalised on 23 February 2020.
16. The applicant made no claim to have suffered relevant family violence. He stated that he knew he could not meet the criteria for the visa. He stated that he has pursued review of the delegate's decision with a view to obtaining a visa by way of Ministerial intervention.
17. As the Tribunal is required to conduct a review, the Tribunal has considered whether the applicant meets cl.100.221. Clause 100.221(2)(b) requires the applicant to be the spouse or de facto partner of the sponsoring partner.
18. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act: s.5F(2) (a). On the evidence, namely a copy of a Queensland marriage certificate certifying they married on 4 October 2014 in Brisbane, the applicant was validly married to the sponsor at the time of application. On the evidence, namely a copy of their Divorce Order, the parties are not married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a) at the time of decision. The Tribunal has therefore considered whether the parties are in a de facto relationship.

Are the parties in a de facto relationship?

19. A person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2). Each of the specific matters contained in r.1.09A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.
20. In forming an opinion whether they are in a de facto relationship, consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision. Each of the specific matters

contained in r.1.09A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Financial aspects of the relationship

21. In response to the Department's natural justice letter of 8 February 2019 regarding the dob-in information, the applicant provided a statement of transactions from the parties' joint bank account for the period 9 April 2019 to 18 April 2019. The statement shows a number of transfers of amounts into and out of other bank accounts, and a large number of small, one-person type (from AUD 7 to AUD 11) food purchases. It does not show that the parties have pooled their resources and share day-to-day expenses at the time of decision.
22. No further evidence was before the Tribunal regarding the financial aspects of the relationship at the time of decision. Indeed, the applicant acknowledged at hearing that the parties do not have joint ownership of assets and/or joint liabilities; that they do not pool their financial resources; that they owe no legal obligations to the other party; and that they do not share day-to-day household expenses.

Nature of the household

23. The parties do not have any children and at the time of decision they are not living in a joint household. No claim was made or evidence provided that they share housework. At hearing the applicant acknowledged that he moved out of the sponsor's house and has been living with a friend for at least the last year.

Social aspects of the relationship

24. Photos were provided of the parties' wedding in 2014 with other people. Several photos, undated and without captions, were provided of the parties together in cafes. The Tribunal put to the applicant at hearing that the sponsor did not look happy in the photos, even at her wedding. The applicant responded, and the Tribunal accepts, that the sponsor was in fact happy on the day of her wedding.
25. No claims were made or information was before the Tribunal that at the time of decision the parties represent themselves or are recognised by family and friends as being in a de facto relationship. There is no indication that they plan and undertake joint social activities. The applicant confirmed that he has no contact with the sponsor, and does not know whether or not she has entered into a relationship with another person. There is no evidence before the Tribunal that the opinion of friends and acquaintances is that the parties are in a de facto relationship, or that the parties plan and undertake joint social activities.

Nature of persons' commitment to each other

26. The Tribunal advised the applicant at hearing that it had two s.376 certificates which covered dob-ins received by the Department in early 2019, and client information held by Centrelink in October 2018. Following the procedures of s.359AA, the Tribunal advised the applicant the gist of the information in the dob-ins was that the relationship had ended and the applicant was manipulating his circumstances to obtain a visa and migration outcome; and the sponsor had declared her status as 'single' to Centrelink. The Tribunal advised the applicant that the information was relevant because it indicated that the parties' relationship ended early in 2019, and suggested that he had tried to manipulate his circumstances to obtain a visa. The Tribunal advised the applicant that if it relied on the information, apart from finding he did not meet the criteria for the visa, the Tribunal might decide his case was not worthy of referral for Ministerial intervention.

27. The Tribunal advised the applicant that it considered the certificates to be valid because they protected the identity of the person who had provided the information in confidence. The Tribunal advised the applicant that he could seek extra time to consider his responses to the issues of the validity of the certificates, and the information they covered. The applicant did not seek extra time to make a submission on the validity of the certificates, or to consider his response to the gist of the information they covered. Later in the hearing, as discussed below, the applicant sought and was granted an adjournment during which he consulted with his representative, following which he stated he has been living with a friend who is an Australian citizen who had an accident, for whom he provides support, and therefore needs to remain in Australia.
28. The Tribunal emailed copies of the certificates to the applicant's representative following the hearing, at his request, but received no response on the issue of their validity. Regarding the dob-ins, the applicant confirmed that he knew about them and that they were referred to in the delegate's decision. He stated that he had no knowledge about how the sponsor represented herself to Centrelink. He stated that the dob-ins had no basis, that he was still in a relationship with his ex-wife early in 2019 as evidenced by the fact that they went to India together. He acknowledged, however, that he had claimed in a statutory declaration signed on 11 May 2020, that he discovered when in India in January and February 2019 that his wife was having an affair, which had gone on for some time, with a person named Rahul Saini. The applicant attached copies of text messages between Rahul Saini and the sponsor.
29. The Tribunal put to the applicant that Rahul Saini was one of the names he used himself; indeed, it was the name he himself provided when required to state his full name while being sworn in at the Tribunal hearing. The applicant asked to be referred to as Mr Rahul but acknowledged that his full name is Rahul Saini. The applicant then stated that the sponsor entered into an affair with a person with the same name. He claimed that he talked to the person also named Rahul Saini who confirmed the affair; that he obtained Rahul Saini's contact details from his ex-wife's phone when she was in the bathroom; and that he didn't know whether or not his ex-wife was still in a relationship with the other Rahul Saini. The Tribunal advised the applicant it found his story about his ex-wife's infidelity with a person of the same name hard to believe.
30. Chat messages were provided from the sponsor's mobile phone dated January 2019. In some of these the sponsor appears to be discussing the end of her relationship with the applicant with a friend of hers in Australia. In others she appears to be castigating the applicant. As noted, at hearing the applicant claimed he discovered phone messages between the sponsor and a person who had the same name as the applicant, with whom she was in an adulterous relationship.
31. No further evidence was provided to the Tribunal regarding the issue of the parties' commitment to the relationship. No claim was made or evidence provided that the parties draw companionship and emotional support from each other, and that they see the relationship as long-term.
32. The Tribunal considers that the parties' relationship ended in early 2019. On the applicant's own admission, at the time of decision the applicant does not live with the sponsor; the parties do not draw companionship and emotional support from each other; and they do not see the relationship as long-term.
33. The Tribunal therefore finds that the parties do not have a mutual commitment to a shared life to the exclusion of others; that they are not in a genuine and continuing relationship; and that they do not live together or not separately and apart on a permanent basis.

34. On the basis of the above the Tribunal is not satisfied that the requirements of s.5CB(2) are met at the time of this decision. Therefore, the applicant does not meet cl.100.221(2)(b) and (2A)(b).
35. The sponsor has not died, the applicant has not claimed to have suffered relevant family violence, and the parties do not have a child of the relationship. For these reasons the Tribunal is not satisfied that the applicant meets the alternative criteria for the visa in cl.100.221(3) and (4).
36. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.
37. The Tribunal has considered the applicant's request, made through his representative, that the Tribunal refer his case to the Minister for his intervention.

Ministerial intervention

38. In a written submission dated 12 May 2020 the representative acknowledged that the applicant was unable to satisfy the criteria for the grant of a Partner visa, for the reason that the applicant was no longer married to the sponsor and could not meet the requirements of cl.100.221. The representative submitted that the applicant had advised them that the sponsor was unfaithful during the relationship; that the applicant had advised them that he had been willing to work on the relationship and forgive the sponsor her indiscretions, however the sponsor chose not to reconcile. The representative submitted that the breakdown of the relationship was therefore beyond the applicant's control.
39. The representative submitted that the applicant has lived in Australia for the last three years and 'has come to call Australia home'. They submitted that during the applicant's marriage he started to build his life in Australia, and the breakdown of the marriage resulted in him losing his home (he moved out of the sponsor's house) and the life he had started to build. It has been difficult for him to start anew. The representative further submitted that the applicant has been 'an exemplary visa holder' who has complied with Australian migration laws and all his visa conditions, including his Bridging visa conditions.
40. The Tribunal asked the applicant questions about his immigration and study history in order to obtain a fuller appreciation of his circumstances. The applicant confirmed that he held Student visas in Australia for five years from February 2009, that his last application for a further Student visa was refused, and that he returned to India in December 2014. The applicant advised that he enrolled in commercial cookery and business management courses. He confirmed that he obtained only one qualification during his time in Australia on Student visas, a Certificate III in Commercial Cookery. He confirmed that his enrolment in a business management course was cancelled for the reason of unsatisfactory attendance. He stated that he has been employed in Brisbane as a kitchen attendant.
41. The Tribunal asked the applicant why he did not return to India when he finished his studies, as per his declared intention when he applied for his Student visas. The applicant advised that as he didn't complete a course in business management, he wasn't able to open a restaurant in India, as was his stated intention. As noted, the applicant advised at hearing that he divorced his first wife in India in 2014. The applicant married the sponsor in Australia in 2014 and is now divorced from the sponsor.
42. The Tribunal referred the applicant to the Ministerial intervention principles and guidelines in the Departmental instructions system, and the requirement for cases to have one or more unique or exceptional circumstances to warrant referral. The Tribunal noted that the general expectation and principle set down in the guidelines is that a person who has not been granted a visa through the normal visa process, will leave Australia. The Tribunal asked the

applicant if he had unique or exceptional circumstances. The applicant stated that it was not his fault that his relationship with the sponsor broke down, and for this reason he should be granted a visa.

43. The Tribunal asked the applicant if he had any reason to fear or not want to return to India. The applicant stated that he had no reason to fear returning to India apart from the fact that there was no future for him in his home country. He stated that at 34 years of age he was too old to join the civil service, and with two failed marriages he would find it hard to find another wife. He stated that his father has died, although he still has a mother, sister and brother in his home country. He confirmed that he is not suffering from and has not been diagnosed with a serious health issue.
44. The Tribunal asked the applicant whether there were, in his case, strong compassionate circumstances that if not recognised would result in serious, ongoing and irreversible harm and continuing hardship to an Australian citizen or an Australian family unit. Following an adjournment at the request of the applicant and his representative, as noted, the applicant stated that he has been living with a friend who has recently become an Australian citizen; that his friend had an accident; that he helps his friend including by doing the shopping; and that they provide support for each other.
45. The Tribunal has considered the applicant's claims and circumstances, and does not find in this particular case that the application of the relevant legislation would lead to unintended consequences, or to unfair or unreasonable results.
46. The Tribunal does not propose to recommend the matter to the Minister for intervention. The Tribunal notes that it advised the applicant during the hearing that it was open to him to do so if he believed he had sufficient grounds to warrant Ministerial intervention.

DECISION

47. The Tribunal affirms the decision not to grant the applicant a Partner (Migrant) (Class BC) visa.

Adrienne Millbank
Member

48.

ATTACHMENT – Extract from Migration Regulations 1994

1.09A De facto partner and de facto relationship

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits the regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;
- the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).